UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*STUDENTS for FAIR ADMISSIONS, INC., *
Plaintiff * CIVIL ACTION
vs. * No. 14-14176-ADB
*
*PRESIDENT and FELLOWS OF HARVARD *
COLLEGE, et al. *
Defendants *
* * * * * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE
April 30, 2015

Courtroom No. 4
1 Courthouse Way
Boston, Massachusetts 02210

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HARVARD OFFICE OF THE GENERAL COUNSEL, (By Ara Gershengorn, Esq.), Smith Campus Center, Suite 980, 1350 Massachusetts Avenue, Cambridge, Massachusetts 02138, on behalf of Defendants

P R O C E E D I N G S

THE CLERK: This is Civil Action No. 14-14176 Students for Fair Admissions versus President and Fellows of Harvard College.

Will counsel identify themselves for the record.

MR. SANFORD: Good afternoon, your Honor. Paul Sanford for plaintiffs, Students for Fair Admissions.

MR. CONSOVOY: Good afternoon, your Honor. Will Consovoy for plaintiffs.

MR. CALDWELL: And Benjamin Caldwell, your Honor, for the plaintiffs.

MR. WAXMAN: Good afternoon, your Honor. Seth Waxman for the defendants. My partner, Felicia Ellsworth, is to my right. And Ara Gershengorn, who's in the university's General Counsel's Office, is to my left.

THE COURT: Ms. Gershengorn I know.

MS. GERSHENGORN: Good afternoon, your Honor.

THE COURT: It's nice to see a familiar face out there.

So it is my hope to get as much done as we can today. I have every confidence that the collective brain power at those tables exceeds mine, so I am happy for whatever guidance and suggestions you have about how we can move this along as efficiently as possible. It is the sort of case that I suspect will ultimately be decided above my pay

level, but we will do everything we can to get it decided with as good and accurate a record as we can as quickly as we reasonably can.

Let me run through my list, and then I am happy to have you all run through your list.

Filed this morning was a motion to intervene. I have not read it yet, other than to sort of skim it.

Does anyone expect to weigh in on that?

MR. SANFORD: We plan to file our response to that within 14 days, your Honor.

THE COURT: Okay. So I'll put that aside until -- you too?

MR. WAXMAN: We will do the same thing.

THE COURT: That's fine. I'll put that aside for now.

The initial disclosures, it looks like, have been made, correct?

MR. WAXMAN: Yes, your Honor, both sides.

THE COURT: Good. I'm happy to hear that.

You've generally agreed to a discovery schedule on expert testimony, summary judgment motions, although the parties seem to have a dispute on how long a period leading up to that that should be. I think that Harvard is asking for 8 months and you all are asking for 15?

MR. SANFORD: Yes, your Honor. That's really the

fundamental issue for today.

THE COURT: Okay.

And then you all would like -- in part, this turns on the fact that you would like all the applications to Harvard over the last four years, and you all would rather do representative samplings of those applications. Have you given any thought as to how that representative sampling would be done?

MR. WAXMAN: We have, your Honor, and I think for the purposes of talking about the admissions files, we need to distinguish between data, that is, the raw data sets of quantifiable information about the applications. We have -- Harvard has a full set of the data for the period that they want to cover for -- on quantifiable information, and we don't see any reason why there has to be some statistical sample of that. We can simply provide them the data set with certain personal identification factors, like name and address, redacted because they're irrelevant for purposes of the analysis.

And then the question, I think the dispute is, what about the actual raw admission folders, which are approximately 40 pages in length? And as to that we are suggesting discussing with them what some reasonable representative sample would be, recognizing that everything that's quantifiable out of that -- out of the -- you know,

the letters of recommendation, and the personal statements, which are highly, highly, personal and sensitive, what representative -- what would a representative sample be.

THE COURT: When you're talking about information that's quantifiable, you're talking about -- you are all welcome to sit if you're more comfortable.

MR. WAXMAN: This role reversal is very uncomfortable for me. I am used to standing when I talk to a judge.

You can stand or sit.

THE COURT: My law clerks told me this makes people uncomfortable, but I digress.

On my very first day, I'm sharing a courtroom with another judge, I sat down in her chair, and it turned out to be a very slippery chair.

(Laughter.)

THE COURT: So after the humiliation of my first day, I've become somewhat reticent about sitting in other people's chairs.

I did sit in one yesterday. I fell into a hole, which I sort of had to climb out of, because it was somebody else's. So now I'm just going to stand.

MR. WAXMAN: Well, this isn't my own chair, either, so I will stand also.

THE COURT: Well, that is if you laughed, because

when I actually fell to the floor, nobody laughed, and I realized that at this point in my life, no one is going to laugh if in I fall to the ground, which is unfortunate.

MR. WAXMAN: A very, very dear friend of mine was sworn in on Friday to the District Court bench, and we had a reception for him at which several retired judges spoke. And one of the retired judges said, There are two things that are going to change in your life now that you've become a United States District Judge: No. 1, no one is going to laugh at you; and, No. 2, you will never know if any of your jokes are funny.

THE COURT: Randy's swearing in?

MR. WAXMAN: Yes.

THE COURT: We were in the same "baby judge school." He probably wouldn't have laughed when I hit the ground either.

MR. WAXMAN: I'm sure he wouldn't have.

THE COURT: I know.

So in terms of the quantifiable information, you're talking about GPA, test scores. Are you quantifying things like recommendation letters? Do they get a number? Is that in those? Like good ones get a "1"?

MR. WAXMAN: There are --

THE COURT: What else is in there?

MR. WAXMAN: When folders are complete, the first

several steps in the admission's process are to have one, two, or three individual readers of the file, and those readers will put numerical scores on a scale of 1 to 5, based on academic ability, personal characteristics, athletic ability, I think are the major ones. And that's all in the database.

THE COURT: For every applicant?

MR. WAXMAN: For every applicant, admitted or not.

THE COURT: And you're willing to grow a database for everybody, and a representative sample for some?

Is there a way to correlate the data set with the applications?

MR. WAXMAN: Well, there is an absolute -- the data set includes the name and the address and where the --

THE COURT: And you're not going to redact that?

MR. WAXMAN: We are going to redact that. We're proposing to redact that.

THE COURT: So once you've redacted that, is there a way for them to look at the application and find it in the data set?

MR. WAXMAN: We can certainly do that for them. So we can say, On this date on line 8,254 of the data set, here's the folder, the full folder, for that applicant.

THE COURT: Two questions: Why is this not sufficient, and I guess a corollary to that, What do you

hope to get out of the paper file that's not available in that numerical file?

MR. CONSOVOY: Your Honor, I think there's more going on in the file than is being led on here.

For example, there are summary statements where there are comments made by people in the Admissions Office about the applicant, which are going to be central to this case.

Names may be central. For example, if an Asian applicant has a non-Asian name or doesn't identify their race, are measures being taken to discover that, which there's been reporting on publicly.

THE COURT: Does the data set indicate ethnicity, to the extent you have it?

MR. WAXMAN: Yes, it does.

MR. CONSOVOY: But if they -- the question is, When they don't have it, what do they do to figure it out? And the name will be essential.

So on the common application, you're not required to give your race. You are, however, required to give your parents' nation of origin. And your name may not look Asian, and, so we want to know -- we think it's central to discovering whether there's invidious discrimination here, trying to match up what type of effort was undertaken to discover that person's race so they could then classify them on a racial basis.

The summary sheets, the comments from the alumni interviewers around the country who meet with these individual students, there may be comments in the file about that as well that won't be captured by the data set we're talking about here.

And this is attempting to root out invidious discrimination. This is the kind of in-the-weeds, tough, digging and rooting we have to do to root out that kind of behavior.

And there is a statistical side of this case, there's no question, and we're happy to speak with them and try to work together collectively to figure out how to handle aggregate data, individualized data, and redacting, if necessary. Although I think you see from our papers we don't think, once the protective order's in place, there's no basis for redacting at all under law, and we would want to be heard on that issue.

THE COURT: Again, this is very preliminary, and I'm happy to discuss this, and I expect this discussion will go on for some time today, if not beyond today. But I am very disinclined to give you all of those application files, and I am disinclined to make them have to redact all of those admissions files.

You make a good point on things like notes to the files, which is something different than, for example,

personal essays, which I am disinclined to give you.

I understand you can make the argument that if somebody writes an essay about their family's trip from China, that could be instructive, but I'm willing to go with the idea that, unless you can dissuade my otherwise, if someone's written an essay about their family's trip from China to America, that that's reflected in other places in their application as well.

MR. CONSOVOY: I think -- I guess I can make two points, your Honor. One is I think some of this is premature. We haven't submitted a document request yet. We haven't asked for every file yet. We may not start by asking for every file. But there may come a time where if some evidence is discovered in this case that might lead us in that direction, we'd want the opportunity to pursue it in this court.

Second, it is a bit unusual that Harvard, in their own paper here, says their entire process is holistic, that everyone is a measure of every aspect of the application, and the essay is essential to it, but then when they say Well, here's what counts for admission, but you don't get to see the essays. I don't see how they can take that position.

THE COURT: I guess what I don't understand is how putting a case like this together you would use what's in

the essays.

MR. CONSOVOY: So imagine there are two students at a deposition and they say, We don't -- race is not the deciding factor for admission, and we hand them one application -- two applications in front of them and say, Explain to me how Student A was not admitted, who's Asian-American, and Student B, who is admitted, and is not Asian-American, why they got in.

I promise you the essay will be central to the deposition.

THE COURT: I would rather sort out a way, if you -- and, again, I'm just thinking aloud here. I am disinclined to give you every application. So I would -- starting from the position of wanting to figure out a way to give you enough to put your case together without having Harvard run to a stop while they redact all these applications.

So if you come up with two students who are exactly the same and then you ask for the complete admissions file, and one's Asian and one's not, or you don't know who's what, and then you ask for the files on those, I think that's a different situation than asking for everybody's file as a broad survey matter.

MR. CONSOVOY: Sure.

THE COURT: And, again, I'm not inclined to resolve

this today, but I need to decide whether or not discovery at 8 months or 15 months, and sort of thinking through some of these issues.

MR. CONSOVOY: I completely understand.

I'm saying, I don't think it will be when two students are the same. It will be when two students are very different, and one got in. And, you know, in terms of SATs and GPAs and schools they went to, and that's when the issue is going to come up.

But, secondly, in terms of the schedule, we're happy to pursue this in a way that doesn't ask the Court to rule on this in the first round of discovery. But we don't think it's really the key factor anyway in whether it's an 8- or 15-month schedule. The depositions, and there needs to be many here, I think, are really what's driving it, and we think eight is unrealistic. It can't be --

MR. SANFORD: May I make a suggestion, your Honor?

THE COURT: Sure.

MR. SANFORD: I think what the joint statement discloses pretty clearly is there are going to be some predicate fundamental discovery battles of the nature being discussed this morning. I would suggest to the Court that if their plan to do a statistical sampling is what the Court ultimately rules is allowed in discovery, that's going to drive discovery in one direction.

What we don't know, as we stand here today, is which direction. But we do know, based on Harvard's admission, that there are 5.6 million pages of documents which, according to Harvard, would require 10 million redactions.

Now, we don't agree with that position, but that position is what's driving the scope of discovery.

We have indicated to Harvard we are willing to work with them on a protective order, on a confidentiality order, and we will also work out FERPA privacy and confidentiality issues with them, because 94 percent of these applicants are not accepted to Harvard. So that puts a large majority of the FERPA into one basket, 94 percent of those.

Subsequent to the filing of that joint statement, we have also now in the last 24 hours had the Lawyers' Committee for Civil Rights file a motion to intervene.

We don't know, as we stand here today, if that intervention motion will or will not be granted. But if it is granted, it will be yet another party in this case, which will increase the number of admitted attorneys to about 11 or 12 from five different jurisdictions all seeking to coordinate and mesh schedules for depositions under a proposed eight-month plan. I think everybody in the room knows that's simply not workable. Even Harvard knows that.

So what I would suggest, your Honor, is let's pick a schedule that gives us a reasonable time period to conduct

the discovery at the rate we determine appropriate, in the sequence we determine appropriate, mindful and sensitive to the schedules of the Harvard admissions officers.

Our proposed schedule is more sensitive to their schedules because it allows discovery beyond the next admission cycle, rather than trying to expedite broad, sweeping discovery in a short eight-month window with attorneys from 11 different entries.

And if the intervenor is allowed into this case, what they did not say in their papers to the Court, but what they have said to us in writing, is that they intend to participate in fact discovery, oral argument, briefing, and expert discovery. So right away that could add an additional two to four experts, approximately, to the case.

THE COURT: When you guys address their motion to intervene, is there -- can you also think about whether there is some way to let them participate short of intervention, sort of an *amicus* kind of role?

MR. SANFORD: We will address that in our response within 14 days, your Honor, because, quite frankly, I'm not really sure which side of the case the proposed intervenor is on. On the one hand they say they want to be a defendant in support of Harvard's policies, to the extent they agree with Harvard's policies, but they don't want them to do the legacy admissions.

So that's going to require us to work through issues on our end, but I think it's clear that the landscape in this case is fraught with potential for discovery disputes that counsel are not able to work through at some point in the future.

So, for example, I would suggest if we were to go with an eight-month discovery schedule, all we're doing is setting ourselves up for motions for extension, and a delay in the production of quantitative data, as well as underlying files, to the extent they are discoverable.

If we have a 15-month cycle, as I have suggested is a practical reality, given the potential number of depositions, which even Harvard concedes is certainly going to be more than ten -- Harvard has conceded in the joint statement that they would like to limit it to ten for their own employees, but non-parties and experts don't count against the deposition limit of ten.

We also are suggesting from the outset, in an effort to be forthright, that we believe this is the type of case which is going to require more than the presumptive limit of 25 interrogatories and 25 requests for admissions. In fact, this case, from a statistical standpoint, might cry out for a significant number of requests for admissions if Harvard is unwilling to stipulate to a lot of the data.

So in coming up with the 8 and 15 months, I think each

side made a good-faith effort, but I would suggest that 15 months reflects the practical realities of these discovery disputes that are going to play out over the next, probably, two to six months, which means depositions probably won't even begin for five or six months. And I don't think it would be appropriate to give Harvard the opportunity to jam the plaintiff on discovery by delaying production of documents, saying it's going to take them a long time to redact documents, and thereby depriving our experts of the opportunity to review these documents until the end of the discovery cycle.

So 15 months gives us what we need to proceed at a reasonable pace, mindful of the number of attorneys, and it gives Harvard some sensitivity and flexibility on their admissions officers' schedule.

THE COURT: I'm not going to give you 15 months, but I am going to give you more than eight.

I think that the longer the discovery schedule is, the more time there is to have discovery disputes, and I think that while whole buildings can be built in a year, you can get a case ready for trial, summary judgment, or something close to that. If it turns out that we had need extensions, we will talk about it as it comes, but I am not going to set a 15-month schedule because it is my experience that things expand to fill the time allotted, and I would rather hold

you on a tighter schedule than trying to keep you guessing about whether or not I'm going to grant your continuances or not.

MR. WAXMAN: Just a couple of things I thought I might respond to.

THE COURT: Focus on 10 or 12 months and which you would prefer.

MR. WAXMAN: Ten.

THE COURT: Twelve?

MR. SANFORD: Twelve.

MR. WAXMAN: I do -- just a couple of things.

First of all, you know, in terms of counsel's speculation about, Gee, we don't know how they really figure out what the race is, I mean, the discovery period is open. They can -- I don't have to tell them how to practice law. They notice a 30(b)(6) deposition and identify some topics.

And they're talking about being jammed at the end of the discovery period on the basis of the depositions. I do want to come to the limits on the specific discovery applications and suggest why, as a going-in matter, the presumptive limits in the local rules ought to apply absent a showing that it shouldn't. I mean, we are talking here in terms of depositions about essentially -- Harvard is a large place, no question. It's not as large as the University of

Michigan, but it's a large place. It has an Admissions Office of 40 people. So this is -- for these purposes, let's say there's some discrimination suit that's brought against, you know, the IBM R&D unit. It's got 40 people in it. In a case like that, in the ordinary run-of-the-mill case like that, no judge would stand for the proposition that there are 40 people here, and, therefore, we need 40 depositions.

And I think it should be incumbent upon them, once we see what the requests are, for them to come forward to us. Maybe we will agree. If not, we can submit it to your Honor or to the magistrate. They want X number of more depositions. We don't think that's necessary. Here's who they want. And a judge or magistrate judge will do what they're paid to do and rule on that.

And the same thing for the request for admissions. And I would suggest, as a going-in matter, a discovery cutoff. I do think that it's important to hold the parties' feet to the fire. They say lively, Well, we should go beyond even the next admission cycle. This is to be litigation that is focused on an Admissions Office that works very hard, particularly in certain times of the year, and extending this longer is not, frankly, helpful to us.

THE COURT: Is there --

MR. WAXMAN: I also just wanted to say I continue

to be perplexed by counsel's repeated reference to the number of jurisdictions that counsel of record in this case are in. I don't see how that counts one way or the other. I think, by their tally, we represent three of those jurisdictions, because I work in D.C., my partner works in New York, and Harvard is here. We will meet whatever discovery -- you know, whatever deadlines are necessary. It's not that hard, frankly, to get here from New York or Boston.

THE COURT: It may be helpful, but I don't generally adjust my schedules based upon whether or not there's out-of-town lawyers or not. I view that to be a choice of the parties about out-of-town. You can participate by phone, if that's easier. But otherwise my schedules are the same for in-town or out-of-town lawyers. I will make reasonable accommodations by not trying to schedule things early in the morning or late in the afternoon so that you can get in or out to where you're going, but that's sort of where I draw the line on that.

Does it make a difference -- I'm not a fan of bifurcation, but I'm just trying to think this through. Is it helpful if you bifurcate liability and remedy? I find in most cases there's enough spillover between liability and remedy that it turns out not to be worth it, and there's all sorts of disputes about which side of the line in

particular, but in this case would bifurcating remedy make a difference to anyone?

MR. SANFORD: Bifurcation is not appropriate in this case. In fact, if this were bifurcated, as Harvard has proposed along the outlines of liability and remedy, what you're going to do is create a built-in dispute at depositions over whether that's a permissible question or not.

Let's --

THE COURT: I wouldn't do it unless there was agreement between the parties that it made sense.

Mr. Waxman, you raised the issue of standing.

MR. WAXMAN: Yes, your Honor.

THE COURT: And also, I think, subject matter jurisdiction. I don't know if you mean those to be the same thing? Can you flesh those out for me?

MR. WAXMAN: Well, we haven't moved to dismiss, as your Honor has undoubtedly noticed --

THE COURT: Right.

MR. WAXMAN: -- because we think we do need to take some discovery in order to ascertain whether we have dispositive motions in this case. And, you know, our initial round of discovery, which we will serve very promptly, will go to the nature of individual standing in this case.

I do want to note that unlike all the other cases in this line; i.e., Bakke, Grutter, Bollinger, Hopwood, there are named individuals as parties.

In this case, not only do we not have a named individual as a party, we don't have an individual named as a complainant in the case. So it's sort of hard to make an *a priori* decision about whether we have a motion to dismiss either under 12(b)(1) or 12(b)(6), and we would purport to take discovery on this. What we have is a plaintiff that was created for the avowed and exclusive reason of suing Harvard, and on its face that doesn't appear like it should establish standing, but it seems pointless to us to burden the Court with a dispositive motion before we have the real facts.

MR. CONSOVOY: Your Honor, may I respond briefly?

We're happy to have discovery on this issue. It's what we expected, and we are happy to share with him about our organization, which has sued not only Harvard but North Carolina as well, and may be bringing other cases as well, no different than the ACLU and NAACP or any other litigating organization. Harvard just happens to be one of the first.

Mr. Waxman left out a case called Parents Involved from the Supreme Court, which involved an organizational plaintiff, just like ours, who had students as members of the organization. This is a very typical way litigation

proceeds. But we're happy to have discovery. I think they'll find it's a regular organization that meets all the qualifications, and I doubt you will entertain a motion on this, but we don't see an issue here.

THE COURT: In terms of a protective order, I'm happy to basically sign whatever protective order you want.

Probably a personal peccadillo, but I'd make sure on the protective order you've thought through the in-court issues, trial, motion practices, etc. I have my own standard language that I add if you don't think to add it yourself, but mine is pretty broad-based, giving me basically complete discretion to do whatever I want during a hearing or trial. So if that's fine with you, I'll add the language, but if you want to parse it a little more finely than that, add your own language.

So I think what I'll do is wait for your briefing on the motion to intervene.

We will set a schedule, probably setting discovery at somewhere between 10 or 12 months, maybe 11, and I think we'll have you in every few months, at least by telephone, to make sure we stay on track.

Is there anything else we can accomplish today?

MR. SANFORD: One housekeeping detail, if I may, your Honor.

As I alluded to earlier, in our joint statement Harvard

had proposed that the ten-deposition limit should be the presumptive limit for party depositions, but that depositions of non-party witnesses, including experts, need not count towards the ten-deposition limit.

I understood Mr. Waxman to be saying something completely different in court today. So I would like to just confirm that we are, in fact, honoring Harvard's representation in the joint statement.

THE COURT: I thought that made sense. I didn't think I heard you say anything inconsistent with that today, but you can clarify.

MR. WAXMAN: We are happy -- what I believe we said in the joint statement is we are certainly willing to accommodate their requests. If your Honor, you know, prefers it to limit -- to apply the ten-deposition limit to Harvard employees and officers, if your Honor says, Look, on a notional basis we should simply apply the presumptive limits of Local Rule 26, then that's fine with us, too. But otherwise we're prepared to live with ten Harvard depositions.

THE COURT: I think that makes sense, just given the nature of the case. But if you want, I can hold off on that. You can get started with discovery and see where we sort of end up -- how many depositions you want to take, how many you want to take -- and then revisit it.

It actually sounded like a reasonable position to me.

MR. SANFORD: I must be must misunderstanding, because I am hearing two different proposals, one in court today and one in the papers in the joint statement.

On page 17 of the joint statement, Harvard specifically stated, quote, "Harvard proposes that the ten (10) deposition limit should be the presumptive limit for party depositions, absent agreement of the parties or order of the Court, but that depositions of non-party witnesses, (including expert witnesses) need not count towards Local Rule 26.1's ten (10) deposition limit," end quote.

That, I think, makes more sense at this stage of the proceeding. And if, as we get further into discovery, we find that we need to exceed the ten-deposition limit for Harvard, we will come back to your Honor and request permission, if Harvard was unwilling to stipulate to that.

THE COURT: That's what I read, and that's what I thought he said today.

Are you saying something different today?

MR. WAXMAN: No. We are prepared to either live with the presumptive limit in the rule or to extend the presumptive limit to ten Harvard.

We are, frankly, quite concerned by, you know, with certain aspects of their initial disclosures and in the joint statement where they reference, for example, well,

there are regional interviewers. There are 15,000 alumni who conduct interviews. These are not Harvard employees.

THE COURT: All those people are not being deposed.

(Laughter.)

MR. WAXMAN: Okay.

THE COURT: So let's start with -- we'll start with a ten-deposition limit for Harvard people. Depositions of experts and non-parties don't count toward that ten, but if anybody feels anybody is trying to depose excessive numbers of people outside of ten, come back, okay?

I'm going to have you in regularly because, well, two reasons. First of all, I don't want this to sort of get out of hand; but, second of all, I really -- I don't want discovery disputes to hold this up. So if you have -- you know, you're at a deposition and you have a discovery dispute, pick up the phone. If you have something that you can handle in a page or two, fax it over. If you need a five- or ten-page motion, send it over. We will keep things moving. I am not referring the discovery disputes to the magistrate. We'll chug through them. And we'll do it quickly, because I am a big believer in "Justice delayed is justice denied" and in keeping these things moving. I will do my part of it, but you guys -- I'm not going to be happy about people walking out of depositions or recessing them because there's a dispute. Just pick up the phone and call,

and we'll deal with it that way.

Anything else?

MR. SANFORD: One other housekeeping detail, if I may, your Honor.

Mr. Waxman brought up the subject of initial disclosures, and I'm glad he did, because we had some issues with Harvard's initial disclosures.

What we have, your Honor, are basically a listing of six or seven names, which is fine, but then we have at least two, if not three, very broad, catch-all categories with not a single name of a Harvard employee identified.

THE COURT: Give me an example.

MR. SANFORD: "Representatives from the Office of Admissions." Not a single name listed. They're Harvard employees. If they plan to reply on them for claim or defense, it should be disclosed.

"A representative from the Office and Institutional Research.

"Information pertaining to admissions statistics."

Not a single name. Yet they're proposing to give us a statistical sampling? I think we are entitled to more detail.

THE COURT: Can you give him a name?

MR. WAXMAN: Well, in our -- first of all, they have exactly the same categories in their list without names

attached.

What we have done is we have specifically identified the Dean of Admissions, the Director of Admissions, and two employees in the Admissions Office. So as to comply with the spirit of initial disclosures, we have also said that there may be other people in the Admissions Office -- I have not interviewed all of them -- who may also independently have admissible evidence that we would use in our case.

When they serve us with their discovery, whether it's a 30(b)(6) deposition or an interrogatory, we can provide that. We are under no obligation for purposes of fronting who the Rule 26(a)(1)(A)(i) disclosures are of identifying -- we've identified the particular people that we know for sure have information that we will use in our case, as the rule requires. And we have, in order to provide as much information as possible, on April 30, before discovery requests, have also pointed out that we have custodians of statistical information, and we have other people in the Admissions Office that we may call.

THE COURT: When you talk about this statistics file that has the numerical statistics for every application, how is that put together? Is someone responsible for that?

MR. WAXMAN: Yes.

THE COURT: Do they have that name?

MR. WAXMAN: Yes, they do. It's Elizabeth Yong.

MR. SANFORD: Elizabeth Yong or another representative from the Admissions Office. She is a former admissions officer, according to their initial disclosures.

So my concern, your Honor, is there are two broad, sweeping categories, if not three, that you can drive a truck through, and we have no clue who they plan to call to rely on for claim or defense.

All I'm asking is some reciprocity to what we gave, which was we identified 58 specific people with title, address, and phone, in our initial disclosures, as is required. I would just like to see Harvard held to the same standards under the rule.

THE COURT: I'm sure he would be happy to give you 258 people, but I'm not sure how helpful you would find that at the end of the day.

MR. WAXMAN: The couple of categories that we've identified without a name are replicated almost identically in categorical designations without names, and they have several more in theirs. And it's April 30. I mean, you know, this is, without question, the most that is required in order to fully allow the parties to practice law the way they're supposed to.

THE COURT: Is it true that Mr. Yong is no longer at Harvard?

MR. WAXMAN: She is at Harvard, but she is retiring at some point, and her -- she will be replaced by somebody who --

THE COURT: Has she yet been replaced?

MR. WAXMAN: No.

She is still an employee at Harvard, so far as I know, and will be for several months.

THE COURT: And still responsible?

MR. WAXMAN: Still responsible.

THE COURT: Great.

MR. SANFORD: For that category, that may be acceptable, at least we have a name, but for two other categories --

THE COURT: What's the next category?

MR. SANFORD: The next category, according to them, the name is "Representatives from the Office of Admissions," and the subject of discoverable information is quite broad. They list "Information pertaining to Harvard's recruitment, admissions policy and practices."

We couldn't take a deposition based on that --

THE COURT: They gave you the name and the contact information for the head of admission, correct?

MR. SANFORD: Yes.

But this is a broad catch-all for the other 39 employees of the Admissions Office. I'm just trying to

avoid getting ambushed down the road, and I would like to have the opportunity to take the deposition of a known individual.

The second category --

THE COURT: I'm guessing what he's saying is that you have the head of admissions and then you have everybody else.

MR. WAXMAN: You have more than the head of admissions.

We've got Grace Cheng, admissions officer.

Sally Donahue, director of the financial aid part of the admission office.

William Fitzsimmons, the Dean of Admissions.

Marlyn McGrath Lewis, the Director of Admissions.

Elizabeth Yong, the admissions officer who has information regarding the database and other things.

THE COURT: Is there someone who is responsible for running the alumni interviewers?

MR. WAXMAN: I don't think there is a person who's responsible for running the alumni interviewers, but, I mean, they will -- when they take a deposition, they will understand how this process works. But, you know, the Harvard admissions process, the 37,000 applications are divided into regional dockets. Each regional docket has a committee of admissions officers who work on it. There are

alumni who reside all across the country, therefore --

THE COURT: How many regions are there?

MR. WAXMAN: I believe 20.

THE COURT: Is there one admission officer responsible for each of those 20 regions?

MR. WAXMAN: No. Each region has a subcommittee of the admissions officers who consider in the first tranche -- who will read the applications from those files and who meet as an initial subcommittee to discuss those applications. And I'm not sure -- I believe that each admissions -- each docket subcommittee has a chair, someone who will sort of run the multi-day meetings that occur. I am not sure there is any title to it, and I am also not sure that one person sticks with, you know, Northern New England every year.

But, you know, Ms. Lewis or Dean Fitzsimmons or the other individuals named could easily provide that information, as could a 30(b)(6) representative.

THE COURT: That's fine.

What I want to make sure is that you're not missing -- like if there's regional chairs, that he could then figure out who to talk to about each region, or if you have someone that coordinates alumni, there's some broad categories that you can give him so he doesn't have to depose 40 people to find out who is responsible for what, I think that would be helpful.

MR. WAXMAN: Yup, and that's why, I mean, they can choose to do it however they want, but I would think if they identified five topics, that they'd want a 30(b)(6) witness to testify about, that would be the most efficient way to do it, or an interrogatory that simply says, you know, How are these arranged and is there a regional --

THE COURT: My point is is that sooner or later he is going to get that information.

MR. WAXMAN: Of course.

THE COURT: To the extent you have that some place, in a chart or whatever, that says this is the regional committees, and this is the chair of that regional committee, that might just expedite things a little bit. We're not talking about information that he is not going to be able to get, and I don't want to be here with him saying he had to waste three of his ten deposition to get stuff that you could have easily provided him with a couple of charts.

MR. WAXMAN: Your Honor, I am not in any way fighting that instinct or that mandate from the Court. I am not suggesting, you know, we're going to make you use up your ten deposition to get in the same zip code as this basic information.

I don't know that we actually have -- that Harvard actually has a chart that shows it. If Harvard actually has

a chart made up that shows it, that's fine.

THE COURT: Well, I think it would be helpful, to the extent that there is some sort of documentation within the Admissions Office about who is responsible for what, if he could get a copy of that, that might move this along.

MR. WAXMAN: There may very well be an organization chart for the Admissions Office, which, if there is, we're obviously very happy to produce.

THE COURT: I think that would save everybody some time, and it's not information that they're not going to have sooner rather than later, and maybe they'll get it sooner.

MR. SANFORD: I apprecaite Mr. Waxman's offer, your Honor. That would be very helpful.

The second category --

THE COURT: I think we're on the third.

MR. SANFORD: Truly the third, but it's outside the Admissions Office.

They have identified a representative from the Office of Institutional Research, and the subject of discoverable information is information pertaining to admissions statistics, which, in some ways, is the heart of this case. But they don't name a witness.

THE COURT: I thought that's what Ms. Yong did.

MR. WAXMAN: No. She is an employee of the

Admissions Office. Harvard also has an office that essentially does, you know, statistical and other institutional research on any topic that the university needs. And we've indicated that there may be -- you know, we may call, or someone in that office may have access to a data set or data sets. I don't think that exists independently of admissions, but --

THE COURT: So you're saying you don't know of anything that resides there that would be relevant to this case, but that there may be information there, and, if there is, you will make someone from that office available to provide that information?

MR. WAXMAN: Absolutely.

THE COURT: Okay.

MR. WAXMAN: And I will say, I don't think it would be an appropriate use of the Court's time to go through their unnamed categories and complain about the fact that although we haven't served any discovery yet, they haven't named somebody. Who is it from the Princeton Board that's going to do something? Who it from unnamed outside consultants that they've identified categorically? It doesn't seem to me that that's the point of a Rule 26(b) conference.

THE COURT: I'm not going to go through all of them, but to the extent there are things I can quickly

resolve here, I assure you it would be a good use of my time, rather than waiting for you to brief it, and you to brief it, and them to brief it, and then reading it all and then deciding the issue.

MR. WAXMAN: I mean, there's nothing -- we will serve our discovery requests, and to the extent we don't get the information we feel we're clearly entitled to, we will be here.

THE COURT: Call or fax away.

MR. WAXMAN: We will call your Honor's offer and either call you, write to you in letter, or send you a very short brief. But I think a lot of this stuff can be, if not resolved, at least crystalized for purposes of decision.

THE COURT: Is there anything else with the initial disclosures that we can close out today?

MR. SANFORD: I don't believe so, your Honor. That was very helpful.

THE COURT: How about from your side, Mr. Waxman?

MR. WAXMAN: I don't think so either.

I guess we will negotiate the terms of a protective order, and if we have disputes about whether the protective order is sufficiently protective, we will crystallize them and bring them to your Honor.

We certainly are going to need, presumably in the same vein as we will produce an organization chart for the

Admissions Office if we need it, the names of their plaintiffs, that is, the people that they haven't named or identified as to who are victimized by the alleged practices.

THE COURT: They are not in the complaint. I am sure there is good and sufficient reason for that, but particularly the people that were not admitted to Harvard, they're going to be entitled to that to go back to those application files and be able to take a look at them.

MR. CONSOVOY: We understand our disclosure obligations, and as soon as a protective order is in place, we're happy to give it. We just want the protective order first.

THE COURT: Anything else I can help anyone with today?

(Whereupon, counsel shake heads in the negative.)

THE COURT: We'll put out a scheduling order. We will have you back in the not-too-distant future, and we will try to get this moved along for you as clearly and expeditiously as we can.

MR. SANFORD: Your Honor, do you want us to deem discovery now open --

THE COURT: Yes.

MR. SANFORD: -- or should we wait until the ruling on the intervention? Because if we start undertaking

discovery in advance of their participation, after they have indicated they intend to participate, I don't want to cause a problem down the road.

THE COURT: My suggestion is is that you start exchanging written discovery, and if you are both going to respond in two weeks, you will have a ruling in three weeks, and they can get caught up, but let's get it going.

MR. WAXMAN: Thank you, your Honor.

THE COURT: Thank you, all.

THE CLERK: All rise.

(Proceedings adjourned.)

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons May 19, 2015
James P. Gibbons

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